



IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1979

No. 79-769

TRUSTEES OF THE COLORADO CEMENT  
MASONS APPRENTICE TRUST FUND,  
TRUSTEES OF THE COLORADO CEMENT  
MASONS PENSION TRUST FUND,  
TRUSTEES OF THE COLORADO CEMENT  
MASONS VACATION TRUST FUND,  
TRUSTEES OF THE COLORADO LABORERS  
HEALTH AND WELFARE TRUST FUND, and  
TRUSTEES OF THE CONSTRUCTION  
ADVANCEMENT PROGRAM,  
*Petitioners,*

v.

BURTON LEVY, CONCRETE PLACERS, INC.  
a Colorado corporation, and  
CELLULAR CORPORATION OF COLORADO,  
a Colorado corporation,  
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**BRIEF OF BURTON LEVY IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the Court of Appeals (Pet. App. C)

and the judgments of the District Court (Pet. App. A and B) are unreported.

### JURISDICTION

The Court of Appeals entered its judgment on August 17, 1979. Petitioners filed their petition for a writ of certiorari on November 15, 1979, invoking the jurisdiction of this Court under 28 U.S.C. §1254(1).

### QUESTION PRESENTED

Whether summary judgment may be granted in favor of a defendant stockholder against plaintiffs who, after availing themselves of repeated opportunities for discovery, presented no evidence or facts adequate under local law to support their conclusory allegations that the stockholder and other corporate defendants were alter egos.

### RULE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure, which is reproduced at Pet. at 2-4.

### COUNTER STATEMENT OF THE CASE

Petitioners filed their original complaint on October 28, 1975, naming as defendants the respondents Concrete Placers, Inc. ("Concrete Placers"), a Colorado corporation, and Burton Levy, a Colorado resident who is a stockholder of Concrete Placers. Petitioners immediately began discovery by simultaneously serving a Request for Production, a Request for Admissions and an Interrogatory. They served a Second Interrogatory in December 1975. They deposed Levy on oral examination on February 18, 1976. On

February 26, 1976, Petitioners filed a Motion for Leave to Amend Complaint and directed a Request for Production to respondent Cellular Corporation of Colorado ("Cellular"), also a Colorado corporation of which Levy is a stockholder. Petitioners joined Cellular as a defendant in their amended complaint on April 1, 1976. The Respondents complied with all Petitioners' discovery requests.

Petitioners' original complaint sought to recover from Concrete Placers certain sums allegedly owed to Petitioners as third party beneficiaries of a collective bargaining agreement between Concrete Placers and the State Conference of Colorado Operative Plasterers and Cement Masons International Association. In addition, the original complaint sought recovery from Levy on the theory that he "was the alter-ego of Concrete Placers" (Pet. at 5).

Petitioners' amended complaint also contended that Cellular "was an alter-ego to both Levy and Concrete Placers" (*id.*). Neither the original complaint nor the amended complaint stated any specific facts upon which Petitioners relied in asserting Levy's personal liability for any corporate obligation. Petitioners appear to contend that Levy committed acts, never identified, which would permit a court to ignore Concrete Placers and Cellular as corporate entities and to hold Levy personally responsible for their obligations. All pertinent acts or transactions occurred in Colorado.

At the pre-trial conference, the District Court attempted to ascertain and limit triable issues, in accordance with Rule 16 of the Federal Rules of Civil Procedure, and specifically asked counsel for Petitioners to state the factual basis of their allegations against Levy. Petitioners' complaint against Levy then had been on file for more than a year; Levy's deposi-



tion had been taken; other discovery had been had; and Levy previously had requested from Petitioners the same information then sought by the District Court. Nonetheless Petitioners were unable to advise the District Court of any facts adequate to support their allegations against Levy. The pre-trial conference concluded with the District Court's order, directed to the attorney who had signed Petitioners' complaints, requiring him to file in writing the specific factual information upon which he relied and any additional information concerning the liability of Levy, individually, which had been developed. The attorney filed his response, Levy filed his motion for summary judgment and Petitioners filed a brief in opposition, supported by affidavits. See Pet. at 5-6.

After a hearing in open court, the District Court granted Levy's motion, concluding that Petitioners had presented "no evidence or supportable statements of fact" indicating any basis for Levy's individual liability. Pet. App. A at 11-12. The Court of Appeals carefully considered all grounds asserted by Petitioners on appeal from the District Court and concluded that the District Court was fully justified, considering the dearth of evidence, in entering a summary judgment and was not obligated to extend the life of the case as to Mr. Levy. Pet. App. C at 22. The Court of Appeals accordingly affirmed the judgment of the District Court.

### ARGUMENT

This case involves only the application of established principles, primarily of Colorado law, to its particular facts. Respondent suggests that Petitioners' real complaint is not so much with the application of Rule 56 as with the application of Colorado law by

the Court of Appeals and the District Court in determining that all factual allegations which Petitioners proffered, even if proved, were insufficient to permit any piercing of the "corporate veil" of either Concrete Placers or Cellular. The decision below is correct, and there is no reason for further review.

### I

Speaking through Circuit Judge Doyle, formerly both a Colorado federal district judge and a justice of the Colorado Supreme Court, the Court of Appeals stated the principles applicable to piercing the corporate veil as follows:

In order to establish as a matter of law that the corporate veil should be pierced and that an individual should be held liable for actions that were carried out in the name of the corporation, it must appear that the corporation was being misused in some manner. For example, that its funds were being diverted or a fraud, constructive or express, was being carried out. We have nothing of this character here.

Pet. App. C at 21-22

Petitioners have not disputed the foregoing principles, which involve questions of Colorado law under the facts presented. Petitioners and their counsel have had ample opportunities to discover and identify "some manner" in which Levy "misused" either Concrete Placers or Cellular. Petitioners propounded written interrogatories to Levy and, in addition, took his deposition upon oral examination. Levy, in turn, propounded written interrogatories to Petitioners asking them to identify each transaction, document, oral communication or agreement which Petitioners

claimed was a basis for or evidence of their allegation that Levy was the alter ego of Concrete Placers.

The opinion below demonstrates that the Court of Appeals and the District Court correctly applied Rule 56. For purposes of his motion for summary judgment, Levy admitted as true all of Petitioners' factual allegations. Pet. App. C at 27. The District Court correctly concluded that, based on all factual allegations made, no claim against Levy could be sustained. See, e.g., *Industrial Commission v. Lavack*, 165 Colo. 433, 439 P.2d 359 (1968); *Contractors Heating and Supply Co. v. Scherb*, 163 Colo. 584, 432 P.2d 237 (1967); and *Fink v. Montgomery Elevator Company of Colorado*, 161 Colo. 342, 421 P.2d 735 (1966). Levy did not argue, nor did either court below hold, that Petitioners had the responsibility of "proving" their allegations in order to oppose Levy's motion for summary judgment. Levy's position was, and is, that Petitioners had the minimal obligation of at least alleging facts which, viewed in the light most favorable to Petitioners, would support their claim against him. Absent even a sufficient allegation, after repeated discovery, which would support the Petitioners' claims, there was no genuine issue as to any material fact and summary judgment was appropriate.

## II

The decision of the Court of Appeals does not conflict with the decision of this Court in *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), or any other decision of this Court. In *Adickes*, this Court held that a defendant's motion for summary judgment was improperly granted when the plaintiff had alleged and testified that a policeman was in the defendant's store during

the incident giving rise to plaintiff's claim under 42 U.S.C. § 1983 for conspiracy to violate her constitutional rights. The presence of the policeman was a substantial fact which could support an inference of such a conspiracy. Here there was, and is, no comparable factual allegation.

## CONCLUSION

The decision below comports with well established principles of Colorado law and presents no significant federal question of substance or procedure justifying any exercise of this Court's discretion to permit further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,



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